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IN THE

Supreme Court of the United States

October Term, 1924.

No. 144.

MRS. CHARLES E. WELLS, *Administratrix of the Estate of Charles E. Wells,*
Appellant,

vs.

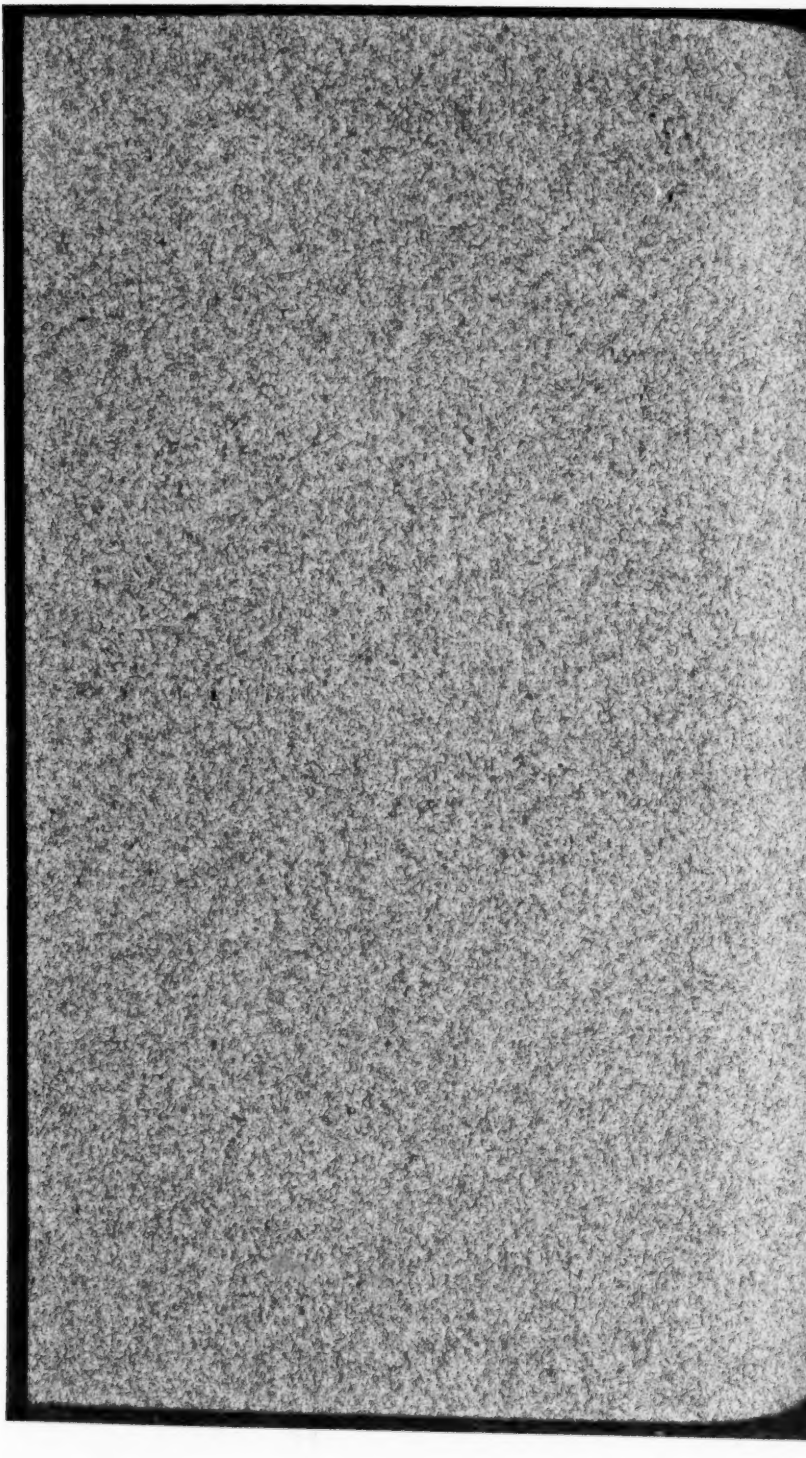
PATRICK H. BODKIN, *and*
ARABELLA BODKIN,
Appellees.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE APPELLEE, ARABELLA BODKIN.

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BRIEF OF APPELLEE.

THE ASSIGNMENT OF ERRORS.

It is believed that the statement of facts that precedes the opinion of the Circuit Court of Appeals (Rec. 131 to 133), should suffice for all the purposes of this court in connection with the merits of the twelve al-

leged errors that are specified in the assignment of errors (Rec. 139 to 142). Hence, to spare expense to the appellee, Arabella Bodkin, widow of Patrick H. Bodkin (defendant with her in the courts below), the facts in this litigation will not be recited herein.

The 1st, the 2nd, the 3rd, the 4th, the 6th and the 9th of the twelve specifications in the assignment present questions of law that have been decided by this court adversely to all contentions made by appellant (McLaren v. Fleischer, 256 U. S., 477); and the Circuit Court of Appeals so decided (R. 133).

The 11th and 12th of the propositions appearing in the assignment are not *specifications* of error at all, but simply charges of error generally without the slightest attempt at specification. Whether appellant meant by such general charges to invite scrutiny of the record by the court in quest for questions of law or fact lurking therein and not detected by appellant's astute counsel in the courts below, is purely conjectural.

The remaining specifications in the assignment, viz., the 5th, the 7th, the 8th and the 10th, present questions that are determinable with reference to the act of Congress of July 26, 1892 (27 Stat. 270), entitled an "act to amend Section 2 of an act approved May 14, 1880" (21 Stat. 150), and the law with respect to the rights of heirs of applicants for homestead entries.

Said amending statute provides, in brief, that the heirs of a contestant of a public land entry shall be entitled to the same right under the second section of the said act of 1880 that "that contestant would have been if his death had not occurred," viz., the right to prosecute the contest to final judgment and, if success-

ful, to a preference over all others, for a period of thirty days after notice of final judgment, as an applicant for entry.

SOME OMISSIONS FROM AND INACCURACIES IN APPELLANT'S BRIEF.

Where a page is referred to in this chapter the reference is to a page of appellant's brief. At page 4 it is stated that the homestead entry Florence Bodkin contested was relinquished. But it is not stated (although the fact is among those in the stipulation as to the facts, Rec. 43), that the relinquishment was filed after the entryman had been duly served with notice of the contest. Nor is it stated at any place in appellant's brief that the Land Department found and decided that the relinquishment was "procured through your (Florence V. Bodkin's) contest." (Rec. 43.)

At page 5 it is asserted that appellant's deceased husband "settled upon said quarter section in ignorance of the legal claims of any other person." However it is in proof that on the 21st day of August, 1913, appellant's husband made an affidavit, which he filed in the Land Department, admitting that he knew of Florence V. Bodkin's right of preference of entry and saying "he (Wells) made overtures to her to purchase her waiver of such supposed right," etc. (Rec. 87 and 88.)

IT IS BEYOND QUESTION THAT FLORENCE V. BODKIN ACQUIRED AND EXERCISED A PREFERENCE RIGHT TO ENTER.

The stipulated facts and the decision of this court in McLaren v. Flescher, *supra*, render it plain that

Florence V. Bodkin acquired the preference right provided for by the second section of the act of 1880.

It is stipulated (Rec. 41 and 42) that not until May 18, 1910, was it possible for her to exercise such preference right. It is also stipulated (Rec. 44) that on that date she exercised such right by filing an application to make homestead entry. It is further stipulated (Rec. 42) that on said date, and by competent authoriay, her application was suspended and that such suspension was not raised until May 22, 1912. In the interim, on March 25, 1912, nearly two years after filing her application, as set out in the stipulation (Rec. 42), Florence V. Bodkin died, "leaving surviving her, as her heirs at law, the said Patrick H. Bodkin, her father, and the said Arabella Bodkin, her mother, defendants herein."

Acting without knowledge of the death of Florence V. Bodkin, the Register of the local land office, on June 1, 1912, allowed a homestead entry to be made under her application (Rec. 47). Also on that date the Register allowed a homestead entry *of other land* to be made by the said Patrick H. Bodkin under an application by him filed on May 18, 1910. (Rec. 69 and 70.)

December 3, 1912, Patrick H. Bodkin filed in the office of the Register at Los Angeles his affidavit "that he entered on this entry of his deceased daughter and cleared about two acres on November 29, 1912" (Rec. 47.)

May 27, 1913, the Assistant Secretary of the Interior decided that the heirs of Florence V. Bodkin had not acquired any right whatever by virtue of the latter's application and the entry allowed thereunder, and that such application and entry should be rejected

and canceled, respectively, and entry by the appellant's deceased husband allowed (Rec. 52 and 53). Said decision was adhered to by the Assistant Secretary on August 29, 1913, when he denied a motion for rehearing that had been filed on behalf of the heirs of Florence V. Bodkin (Rec. 54 to 60). Accordingly, and on October 14, 1913, a homestead entry of the land by the appellant's husband was allowed (Rec. 46).

But on January 3, 1914, in action on a petition filed on behalf of the heirs of Florence V. Bodkin, the Assistant Secretary of the Interior, perceiving and admitting the error in his previous decisions, decided that the said heirs were entitled to complete and perfect a homestead entry under Florence V. Bodkin's said application and made order accordingly, as follows:

> "Thirty days from notice of this decision is therefore hereby allowed the father of said Florence V. Bodkin, appearing herein as one of her heirs, to elect whether he will relinquish his present homestead entry and make, with his wife as co-heir, homestead entry based upon said Florence V. Bodkin's application, at the expiration of which period further adjudication will be had.
>
> "The case is remanded for action in accordance with the foregoing." (Rec. 63.)

Thereafter Patrick H. Bodkin relinquished the homestead entry he had made in his individual right and, joining with his wife, Arabella Bodkin, made homestead entry of the land here in suit and subsequently obtained a patent therefor, the patent running to the heirs of Florence V. Bodkin, deceased. (Rec. 65 to 71.)

RIGHTS OF HEIRS OF PRIOR APPLICANTS FOR HOMESTEAD ENTRY.

Whether the aforesaid decision of the Assistant Secretary of the Interior of January 13, 1914, deprived the appellant's deceased husband of a right under the homestead laws to an entry of the land in suit is the real and only question in this litigation. *Was appellant's deceased husband that applicant for the land in suit who was prior in right? If not, the Interior Department's said decision neither denied nor deprived him of any rights under the law.*

It is conceded, we think, that Florence V. Bodkin's application was prior in right by virtue of the right of preference which the act of 1880 conferred on her by reason of her successful contest against the Geiger homestead entry.

Although the decision of the Land Department in Wells v. Bodkin (42 L. D., 340), is that decision which the Department subsequently revoked, nevertheless it contains a discussion of the act of July 26, 1892, *supra*, which is indubitably sound. The following is quoted therefrom:

> "The purpose of the act of July 26, 1892, *supra*, giving to a contestant's heirs the right of succession to his contest and title to 'the same rights' he would have if he had not died, was, as stated in the case of Heirs of Robert M. Averett (40 L. D., 608): 'to provide a means whereby the heirs of a deceased contestant might derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived; that is, the joint right of the heirs to continue the prosecution of a contest and a preference right to make entry of the land by all of said heirs who are citizens of the United States.'

> "This statute was manifestly enacted in recognition of the rights acquired and acquirable by a contestant under his contest, and was designed to secure all such rights to the contestant's heirs." (42 L. D., 340 at 341-342.)

And as the right of a successful contestant is the right *to an entry,* may we not quite confidently assert that under the act of 1892 the heirs of Florence V. Bodkin succeeded to her *right to an entry.* The right of those heirs to an entry, was the same right Florence V. Bodkin had, viz., *a preference right, a preference right over Wells, an unquestionably clear prior right over Wells.*

But appellant seems to contend that Patrick H. Bodkin was not qualified to exercise the preference right which the act of 1892 conferred upon him as one of the heirs of Florence V. Bodkin, because Patrick H. Bodkin was claiming under an unperfected homestead entry made in his own right. And appellant seems further to contend that Arabella Bodkin was not qualified to exercise the preference right which the act of 1892 conferred upon her as one of the heirs of Florence V. Bodkin, because Arabella was the wife of Patrick H. Bodkin, living with him, and therefore a married woman having a status disabling her to make a homestead entry.

But those contentions of appellant are beside the question here, viz, was Florence V. Bodkin's preference right and her application sufficient in law to defeat all the claims of the appellant's deceased husband? Moreover, the appellant's said contentions are made without appreciation of the proposition that the act of 1892 does not confer the right upon the heirs of the successful contestant conditionally. *The right is*

conferred upon the heirs unconditionally. The act of 1892 does not declare that the heirs competent to succeed to the successful contentant's right shall be heirs who are qualified to make homestead entries in their individual right.

Besides, as remarked by the Circuit Court of Appeals (Rec. 135 and 136):

> "The question whether the heir should be required or permitted to relinquish a homestead entry in his own right was one between him and the United States with which the appellant had no concern."

But let us drop from this case, for purposes of argument only, the aforesaid succession act of 1892. Was Florence V. Bodkin's prior right as an applicant by virtue of the act of 1880 any different in law from the right of an applicant who is prior simply because he applied before others applied? A person who applies before others apply acquires a priority which vests in his heirs upon his death. And what vests in them is a right to an entry by them under and by virtue only of the decedent's application. And such entry they may perfect, complete and cause to ripen into a patent, *without residing upon the land.* The Interior Department has so held, and that it has so held for many, many years is known to this court.

When Fisher v. Rule (248 U. S. 314) was under consideration here, this court took notice of Fisher v Heirs of Rule (43 L. D. 217). That Departmental decision is cited in this court's opinion in Fisher v. Rule, *supra.* And that Departmental decision cites Bertram C. Noble (43 L. D., 75). Hence it is assumed that the purport of the two Departmental decisions

just mentioned are entirely familiar to this court; and because of that assumption we will not quote from either. Sufficient is it to remark that those two cases relate to *homestead entries* by persons who died before they established residence under their entries, the Interior Department deciding in each that the heirs could perfect, complete and obtain patents under the entries *without residing on the lands therein*, provided the lands were cultivated by the heirs.

While allowance of an entry in the name of Florence V. Bodkin after her death was a null and void entry and her heirs, of course, were not benefited thereby and not entitled thereby to invoke the principle enunciated in the two Departmental decisions just alluded to, nevertheless, those heirs had the status and rights of heirs of a prior applicant. That status and those rights were the same status and rights that were considered by the Interior Department in Lotton v. Hobbie (43 L. D., 229). In that case no entry had been allowed before the death of the prior applicant. However, the Interior Department said, and cited many authorities to support it in so saying, that *a valid application is equivalent to an actual entry so far as the rights of an applicant and his heirs are concerned.* The syllabus of the decision in Lotton v. Hobbie is this:

> "By the filing of an application to make homestead entry of land properly subject thereto the applicant acquires a right which upon his death prior to allowance of entry descends to his widow or heirs, who may make entry and perfect title by proper cultivation for the required period without actual residence on the land." (43 L. D., 229.)

In Fisher v. Rule, *supra,* this Court pointed out that the Land Department wrongfully canceled the entry of Rule, a decedent, doing so under a misapprehension as to the law bearing on the rights of Rule's heirs. Before the Department corrected the erroneous action Fisher tendered an application for the land. It was under the corrective decision that patent issued to the heirs of Rule. In the case at bar the Land Department wrongfully rejected the homestead application of Florence V. Bodkin, deceased, doing so under a misapprehension as to the law bearing on the right of Florence V. Bodkin's heirs. Before the Department corrected the erroneous action Wells was permitted to make entry. It was under the corrective decision that Wells' entry was canceled and that patent issued to the heirs of Florence V. Bodkin.

In Fisher v. Rule, *supra,* this court referred to the established rule of decision by the Land Department that the heirs of a deceased entryman who had never established residence may complete the decedent's entry and obtain patent thereunder without residing upon the land, provided the heirs cultivate it. The reference was in these words:

> "Even if under a right construction of the homestead law Rule was not entitled to the patent —*which we do not at all intimate*—Fisher is not in a position to take advantage of the error." (Italics ours.)

If this court would "not at all intimate" that a rule of decision of the Land Department that allows heirs of homestead *entrymen* to acquire patents without residing upon the lands described in the patents, was unsound and unlawful, why may we not confidently

believe that in this case, *a case wherein the heirs of a homestead applicant are shown to have resided upon and cultivated the lands applied for by their deceased daughter*, that this court will "not at all intimate" that Patrick H. Bodkin and Arabella Bodkin received a patent to public land to which Charles E. Wells was entitled under the law.

In short, unless this court knows of some law under which Wells acquired a right to the land in suit and is of opinion that such law was disregarded, overlooked, or erroneously construed to the prejudice of Wells, the concurring decrees below must be affirmed.

Respectfully submitted,

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